

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 142.

NARCISO BASSO, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 7, 1914.

(24,200)

(24,200)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 20, 1915.



1

I. Petition. Filed July 7, 1905.**In the Court of Claims of the United States, Term 1905-1906.****No. 28142.**

**NARCISO BASSO, Claimant,
against
THE UNITED STATES.**

Petition.

Narciso Basso, the petitioner above named by Henry M. Ward, his attorney, for his petition against the United States, respectfully shows to this Honorable Court and alleges as follows:

First. That your petitioner is a native born subject of the King of Spain and at all the times hereinafter referred to, resided, has since resided and now resides in the town of Humacao, in the Island of Porto Rico.

Second. That on the 12th day of August, 1898, a protocol, providing for a treaty of peace between the Kingdom of Spain and the United States of America was duly signed by the representatives of both governments, and thereafter and on the 10th day of December, 1898, the treaty of peace was entered into and duly signed by the duly authorized representatives of both governments, and thereafter and on the 6th day of February, 1899, the said treaty 2 of peace was duly ratified by the Senate of the United States of America and was thereafter ratified by the Queen Regent of Spain on the 19th day of March, 1899, and by the Spanish Cortes, and said treaty was finally ratified by both governments, and ratifications thereof exchanged at the city of Washington in the District of Columbia on the 11th day of April, 1899, and on the same day proclaimed by the President of the United States of America.

Third. That said Island of Porto Rico was occupied by the military forces of the United States prior to the 1st day of January, 1899, and on the 1st day of February, 1899, the President of the United States by a certain executive order promulgated the "Amended Customs Tariff and Regulations for Ports in Porto Rico," as a tariff fixing and providing for the collection of duties upon all articles imported into Porto Rico, and thereafter duties were collected under and pursuant to said "Amended Customs Tariff and Regulations," and the amendments thereof made from time to time by order of the President until the 1st day of May, 1900.

Fourth. That during the said period from the 1st day of February, 1899, to the 1st day of May, 1900, certain officers of the Army of the United States were designated to act and did act as 3 collectors of customs at the several ports of entry in Porto Rico, and enforced the said "Amended Customs Tariff and Regulations" at all times during said period upon articles of

merchandise brought into Porto Rico from the United States, as well as upon similar articles imported into Porto Rico from foreign countries.

Fifth. That during the months of July and August, 1899, George W. Davis, Brigadier-General of Volunteers, was in command of the department of Porto Rico, and had established a provisional court of the United States for the Department of Porto Rico, under authority of General Order No. 88 to the terms of which order your petitioner begs leave to refer when produced upon the trial of this action.

Sixth. That on or about the 13th day of July, 1899, an information was filed by one G. M. Keedy, the prosecuting attorney of the Provisional Court, charging your petitioner with the crime of having imported into the Island of Porto Rico at the City of Humacao on the 29th day of April, 1899, on the schooner Jennie A. Stubbs, a certain trunk containing scissors valued at the sum of Two hundred dollars (\$200), without having made entry of the same in the Custom House at Humacao, Porto Rico, and of having illegally imported into the Island of Porto Rico from the United States said goods without having paid the duty thereon. That your petitioner was arraigned under said charge on the 14th day of July, 1899, and

pleaded not guilty, and thereupon said plea was entered and
4 the cause set for trial on July 18, 1899. At the said trial

your petitioner appeared by counsel and testified as a witness in his own behalf, and by said counsel your petitioner entered a plea that Sections 2865 and 3082 of the Revised Statutes of the United States were without force and effect in Porto Rico on said date, to wit: the 29th day of April, 1899, and further that the Island of Porto Rico then was a part of the United States and that there was no warrant of law for imposing any duty on goods brought from the United States into that island at that time. That said defences were not allowed and your petitioner was found guilty and thereupon your petitioner was sentenced by the Court to be confined in the "Carcel Real" or prison in the City of San Juan, Porto Rico for the period of one month and pursuant to said sentence, your petitioner was thereupon imprisoned and kept in close confinement in said prison for the term of twenty-seven days, the sentence of one month having been commuted three days for good behavior on the part of your petitioner.

Seventh. Your petitioner further shows that the said prison was the place where all convicts were imprisoned and that during said term your petitioner suffered great hardships and privations and had to submit to great indignity in being deprived of his liberty and put

5 in the company of felons and convicts, and that your petitioner suffered special damage in that your petitioner retained an attorney to defend him against the said accusation and that the services rendered by said attorney to your petitioner in the premises, were reasonably worth the sum of Five hundred dollars (\$500), which sum was charged by said attorney and paid to him by your petitioner; that your petitioner prior to the trial was held under bail of Two Thousand Dollars (\$2,000) within the limits of

the town of Humacao for the period of one month and could not leave said town without the permission of Captain C. E. Dentler, before whom your petitioner was thereafter tried; that during said period he was kept under watch by the military authorities and thereby brought into disrepute in the community and that your petitioner was compelled to hire a conveyance to take him to San Juan to meet the said accusation and to attend the trial, the reasonable cost of which, paid by your petitioner, was the sum of Twenty Dollars and that during his imprisonment the food offered to your petitioner by the warden of the prison was of such bad quality and so different from that to which your petitioner was accustomed, that he was obliged to buy food from the jailer at the cost of Thirty Dollars (\$30); that your petitioner at the time of his said accusation, was engaged in business with his brother as general commission merchants under the firm name of "Bertran Hermanos" 6 with a capital of \$100,000 and with yearly profits of about \$20,000 and your petitioner was a prominent and highly respected member of the community, but by reason of said charge and accusation and of said imprisonment, your petitioner was not only deprived of his liberty but his good name and reputation in the community were injured.

Eighth. That by reason of the premises your petitioner has suffered general damage of Seven Thousand Five Hundred (\$7,500) Dollars and special damage of Two Thousand Five Hundred (\$2,500) Dollars, making in all Ten Thousand (\$10,000) Dollars.

Ninth. That as your petitioner is advised by counsel there was on the said twenty-ninth day of April, 1899, no warrant of law for the collection of any duties whatever upon any articles brought into the Island of Porto Rico from the United States and that the act of which your petitioner was then accused and for which he was tried and condemned as aforesaid, did not then constitute a crime and that the said sections of the Revised Statutes of the United States under which said Provisional Court claimed authority to act, were not in force in the Island of Porto Rico and said Provisional Court was wholly without jurisdiction in the premises and its sentence was null and void and by reason of said accusation, trial, conviction, sentence and imprisonment, your petitioner was deprived of his liberty without due process of law and in violation of the rights secured to him by the Constitution of the United States. 7

Wherefore your petitioner demands judgment against the United States for the sum of Ten Thousand (\$10,000) Dollars and for such other and further order or relief as he may prove himself entitled to and your petitioner will ever pray, etc.

Dated, July 5, 1905.

(Signed)

NARCISO BASSO,

Petitioner.

HENRY M. WARD,

Attorney and Counsel for Petitioner.

32 Nassau Street, New York City.

8 STATE OF NEW YORK,
County of New York, es:

Narciso Basso, being duly sworn, deposes and says: I am the petitioner above named; I have read the foregoing petition and the same is true to the best of my knowledge, information and belief. I am the owner of the claim herein above referred to, and I have never assigned said claim or any part thereof; there are no offsets or counter-claims to the said claim, and I am now entitled to receive the whole amount thereof as prayed in the petition.

(Signed)

NARCISO BASSO.

Sworn to before me this 5th day of July, 1905.

[L. S.]

RALPH KIRBY,

Notary Public, Nassau County.

Certificate filed in New York County.

9 II. Traverse. Filed July 1, 1913.

In the Court of Claims of the United States, December Term, A. D. 1913-14.

No. 28142.

NARCISO BASSO
 vs.
 THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

HUSTON THOMPSON,
Assistant Attorney General.
 J. R. W.

10 III. Defendant's Motion to Dismiss for Want of Jurisdiction.
 Filed July 1, 1913.*Defendant's Motion to Dismiss.*

Now comes the defendant, by its Attorney General, and moves the court to dismiss the above-entitled cause, upon the ground that it has no jurisdiction to consider the same because it is an action for damages in a case sounding in tort.

HUSTON THOMPSON,
Assistant Attorney General.

W. F. NORRIS, Attorney.

11 IV. Argument and Submission of said Motion.

On February 24, 1914, the defendant's motion to dismiss for want of jurisdiction came on to be heard. Mr. William F. Norris was heard in support of the motion; Mr. Henry M. Ward was heard in opposition and the motion was submitted.

12 V. Judgment of the Court.

At a Court of Claims held in the City of Washington on the 23rd day of March, 1914, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendant, and do order, adjudge and decree, that the defendant's motion to dismiss claimant's petition for want of jurisdiction be sustained, and that the petition of the claimant, Narciso Basso, be and the same is hereby dismissed.

By the COURT.

13 VI. Application of Claimant for and the Allowance of an Appeal.

From the judgment rendered in the above entitled cause on March 23, 1914, in favor of the United States, the claimant, by his attorney, on this 24th day of April, 1914, does hereby make application for and give notice of an appeal to the Supreme Court of the United States.

HENRY M. WARD,
Attorney for Claimant.

Dated April 24, 1914.

Ordered: That the above appeal be allowed as prayed for.
By the COURT.
April 27, 1914.

14

Court of Claims.

No. 28142.

NARCISO BASSO
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the judgment of the Court sustaining the defendant's motion to dismiss for want of jurisdiction; of the application of claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

NARCISO BASSO VS. THE UNITED STATES.

In testimony whereof I have hereunto set my hand and affixed
the seal of said Court of Claims this 4th day of May, A. D. 1914.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

Endorsed on cover: File No. 24,200. Court of Claims. Term No.
142. Narciso Basso, appellant, vs. The United States. Filed May
7th, 1914. File No. 24,200.





FILE COPY.

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Office Supreme Court, U. S.

FILED

DEC 31 1915

JAMES D. MAHER

CLERK

To be argued by
HENRY M. WARD.

Supreme Court of the United States,

OCTOBER TERM, 1915.

No. 142.

NARCISO BASSO,
Appellant,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANT.

This case is here on appeal from the Court of Claims upon a question of jurisdiction only. The suit was brought to recover damages for a violation of the claimant's constitutional rights in that he was deprived of his liberty without due process of law. While the suit was brought in July, 1905, and thereafter testimony was taken in behalf of the claimant, the attorney general, in order to have the question of law determined, filed a motion in July, 1913, to dismiss for want of jurisdiction. The motion was granted and judgment rendered that "the defendant's motion to dismiss claimant's petition for want of jurisdiction be sustained, and that the petition of the claimant, Narciso Basso, be * * * dismissed" (p. 12). The court below did

not render any opinion. The only question now before this court is whether or not the court below had jurisdiction of the claim, and that is the only point that will be argued. The facts stated in the petition upon which the jurisdiction of the court was invoked may for the purposes of this appeal be taken as admitted. The petition sets forth that the claimant is a Spanish subject who resided at the time the cause of action accrued and at the time the petition was filed in the Island of Porto Rico (p. 1). The petition then sets forth the cession of Porto Rico to the United States by the treaty of Paris, ratifications of which were exchanged on April 11, 1899 (p. 1), the establishment of a provisional court of the United States for the Department of Porto Rico by the general officer of the United States Army in command of the military forces in that island (p. 2), and that in July, 1899, the claimant was charged before this provisional court with the crime of having imported from the United States into the Island of Porto Rico on April 29, 1899, certain merchandise without having made entry of the same in the custom house and without having paid duty thereon (p. 2). It is further alleged that the claimant was arraigned in July, 1899, pleaded not guilty, and the case was set for trial and that at the trial plaintiff contended that the sections of the Revised Statutes relating to the crime of smuggling were without force and effect in Porto Rico on April 29, 1899, and further that the Island of Porto Rico then was a part of the United States and that there was no warrant of law for imposing any duty on goods brought from the United States into that island at that time (p. 2). The pleas were not allowed, the claimant was found guilty and sentenced to one month's imprisonment. The sentence was carried out, the claimant imprisoned and kept in close confinement for twenty-seven days (p. 2). The petition then sets forth facts upon

which the claimant makes a claim for special damages in the sum of \$2,500 and general damages in the sum of \$7,500 (pp. 2 and 3), and at the conclusion of the petition the claimant sets forth that by virtue of such imprisonment he was deprived of his liberty without due process of law and in violation of the rights secured to him by the Constitution of the United States (p. 3), thus basing his claim upon the Constitution.

FIRST POINT.

The jurisdiction of the Court of Claims over a claim *ex delicto*, founded upon the Constitution of the United States, is supported by the recent decisions of this Court.

Concededly the cause of action not merely "sounds in tort" but is based solely upon the tortious actions of the agents of the United States. The cause of action set forth in the petition is analogous to an action for damages for false imprisonment, and there is no theory of contract liability involved. The claimant's theory of the case is that on April 29, 1899, he had the right, secured to him by the Constitution, to bring his goods from the United States into Porto Rico without the payment of duty. Having this right he was not obliged to make any entry of the goods and therefore could not commit the statutory crime of smuggling with respect to goods brought from the United States. The military court convicted him of a crime, not because of any wrongful decision upon the facts, but because the court erroneously held that a customs tariff was in force as against

importations from the United States, and that therefore goods coming from the United States must be entered and duty paid, in default of which the crime of smuggling would be committed. It is not contended that the plaintiff had not done the act for which he was held guilty of smuggling, but that the act which he concededly did, that is, the bringing of goods from the United States into Porto Rico without making entry thereof, did not constitute a crime, but on the contrary was an act which he had a constitutional right to perform without interference on the part of the agents of the government. This right was properly set up by plea to the court, but the court nevertheless adjudged him guilty, and caused him to be imprisoned and deprived of his liberty for a period of nearly thirty days.

In *Ochoa vs. Hernandez*, 230 U. S. 139, the court says with reference to the same order by which the provisional court which rendered the judgment in this case was established:

"Under all the circumstances we deem it clear that the Governor was without authority from the President to make any order judicial in its nature that would have the effect of depriving any person of his property without due process of law" (p. 160).

The case therefore brings up squarely the question as to whether the words in the Tucker Act "in cases not sounding in tort" apply to any other of the classes of claims over which jurisdiction is conferred than those for "damages liquidated or unliquidated."

We submit, in the first place, that this point has been decided in our favor by this Court in the case of *Dooley v. United States*, 182 U. S. 222. In that case, at page 224, this Court says:

"The first section (of the Tucker Act) evidently contemplates four distinct classes of

cases: (1) those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an Executive Department; (3) cases of contract, express or implied, with the Government; (4) actions for damages, liquidated or unliquidated, in cases *not sounding in tort*. The words, '*not sounding in tort*,' are in terms referable only to the fourth class of cases." (Italics ours.)

The court then reviews a number of cases on jurisdiction under the Tucker Act, and at page 228 says:

"But whether the exactions of these duties were tortious or not; whether it was within the power of the importer to waive the tort and bring suit in the Court of Claims for money had and received as upon an implied contract of the United States to refund the money in case it was illegally exacted, we think the case is one within the first class of cases specified in the Tucker act of claims founded upon a law of Congress, namely, a Revenue Law, in respect to which class of cases the jurisdiction of the Court of Claims under the Tucker act has been repeatedly sustained."

In *United States vs. Lynah*, 188 U. S. 445, Justice Brown wrote a concurring opinion in which citing *Dooley vs. United States*, he stated at page 474:

"While I think the overflowing of the lands in controversy constitutes a taking within the meaning of the fifth amendment to the Constitution, I see no reason for holding that there was an implied contract to pay for them within the meaning of the Tucker Act. The taking appears to me an ordinary case of trespass to real estate containing no element whatever of contract. In such case there can be no waiver of the tort."

and at page 475, he says:

"In my view claims founded upon the Constitution may be prosecuted in the Court of

Claims whether sounding in contract or in tort."

It further appears, from page 479 of the report that Justices Shiras and Peckham concurred in Justice Brown's opinion as well as in the opinion of the court written by Justice Brewer and concurred in by Justice Holmes. The opinion of the court sustained the jurisdiction upon the ground

"that there has been a taking of the lands for public uses, and that the government is under an implied contract to make just compensation therefor" (p. 474).

Justice White wrote the dissenting opinion, in which the Chief Justice and Justice Harlan concurred. At page 480 he says:

"As, in my opinion, the findings of fact do not support the conclusion that the property has been taken by the United States, I dissent both on the subject of jurisdiction and on the merits."

In this opinion, however, it is not contended that the jurisdiction was lacking because the damage suffered by the plaintiff was tortious but because it was a case of *damnum absque injuria*, with respect to which relief could not be had in the courts (p. 484).

We submit that while a majority of the court did not concur in the opinion of Mr. Justice Brown in which he held squarely that claims founded upon the Constitution may be prosecuted in the Court of Claims whether sounding in contract or in tort, nevertheless it follows as a necessary and logical conclusion from the two prevailing opinions in that case that the words "not sounding in tort", as was held in the *Dooley* case, refer only to claims for "damages liquidated or unliquidated" and not to the three other classes of claims over

which jurisdiction is given. This is necessarily so because if the words "not sounding in tort" relate to any one of the three classes of claims preceding those for "damages liquidated or unliquidated," they must necessarily relate to all of them; that is to say, if they relate to claims founded upon the Constitution or to claims founded upon any act of Congress, they must also necessarily relate to claims founded upon contract express or implied. Conversely, if it be demonstrated that they do not relate to any one of these three classes of cases, it must necessarily follow that they do not relate to any of them.

As we have pointed out, this court has held in the *Dooley* case that the words "in cases not sounding in tort" do not apply to claims founded upon any law of Congress. In *United States vs. Lynah*, this court has in effect held that they do not apply to claims founded upon an implied contract with the government of the United States. In the *Lynah* case, four of the justices were of the opinion that *while the acts of the agents of the government were tortious*, yet the claimant might waive the tort and sue the United States upon an implied contract to make just compensation for the claimant's lands which had been taken as a result of the improvement of the river. Mr. Justice Brown in his concurring opinion, in which Justices Shiras and Peckham concurred, held that the act of the agents of the government was a mere trespass upon the claimant's lands and that no contract could be implied. However this may be, it is clear that the acts of the agents of the government toward the claimant upon which his claim was based made the claimant's cause of action a "case sounding in tort", that is to say, a case upon which an action in tort could have been maintained. Necessarily, therefore, the words "in cases not sounding in tort" do not relate to claims founded upon an im-

plied contract with the government of the United States.

This conclusion also necessarily follows from the later cases, such as *United States vs. Welch*, 217 U. S. 333; *United States vs. Grizzard*, 219 U. S. 180; *United States vs. Emery*, 237 U. S. 28, in all of which the jurisdiction of the Court of Claims has been sustained in actions "sounding in tort" but founded upon a law of Congress or upon an implied contract.

In *United States vs. Welch*, 217 U. S. 333, suit was brought against the United States in the Circuit Court under the Tucker Act for damages sustained by the plaintiff, through his land having been flooded by the erection of a dam constructed by the United States government. It was contended by the Attorney-General (pp. 335, 336) that

"No action can be maintained against the United States under the Act of March 3, 1887 (24 Stat. L. 505) to recover damages in the nature of a trespass, whether proximate or consequential, because such action would necessarily 'sound in tort' and therefore without the jurisdiction of the court."

This court, following *United States vs. Lynah*, affirmed the judgment of the trial court, and thus by implication sustained the jurisdiction over a claim sounding in tort but based upon the Constitution.

Jurisdiction was also questioned by the Attorney General in *United States vs. Grizzard*, 219 U. S. 180, in which the judgment of the court below was affirmed. The cause of action was similar to that involved in *United States vs. Welch*.

In *United States vs. Emery*, 237 U. S. 28, at page 32, this court says:

"However gradually the result may have been approached in the earlier cases, it now has become accepted law that claims like the present are 'founded upon' a revenue law. The argument that there is a distinction be-

tween claims 'arising under' * * * and those founded upon * * *, a law of the United States rests on the inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye (*Dooley vs. United States*, 282 U. S. 222; *United States vs. Hvoslef*, March 22, 1915; *ante*, p. 1. Jurisdiction was taken for granted in *United States vs. N. Y. and Cuba S. S. Co.*, 200 U. S. 488, and was upheld in *Christie Street Commission Co. vs. United States*, 136 Fed. Rep. 326; *United States vs. Hyams*, 147 Fed. Rep. 1580; *United States vs. Finch*, 201 Fed. Rep. 95, 97.)"

The case of *Christie Street Commission Company vs. United States*, 136 Fed. Rep. 326, approved by this court in the *Emery* case just cited, was brought to recover internal taxes illegally collected, and the court (Circuit Court of Appeals for the 8th Circuit) held on page 331 that while the claim was tortious it was founded upon a law of the United States, and therefore the action could be maintained.

In *United States vs. Finch*, 201 Fed. Rep. 95, cited in the *Emery* case, the Circuit Court of Appeals for the Seventh Circuit sustained the jurisdiction with respect to a similar action brought for the recovery of internal revenue taxes.

In *United States vs. Hyams*, 146 Fed. Rep. 15, the Circuit Court of Appeals for the First Circuit points out, on page 18, that the expression found in *Schillinger vs. United States*, 155 U. S. 163, 167, that

"Some element of contractual liability must lie at the foundation of any action brought under the Tucker Act",

has been limited if not overruled by more recent cases, notably that of *Dooley vs. United States*, 182 U. S. 222.

The case at bar, involving as it does only the question of jurisdiction affords this court an oppor-

tunity of setting at rest once and for all the contention so frequently urged that the words "not sounding in tort" limit claims founded upon the Constitution or laws of the United States.

As is pointed out in the *Dooley* case (182 U. S. 222), at page 228, in *Hill vs. United States*, 149 U. S. 593, in which jurisdiction was denied on the ground that it was an action sounding in tort, no distinction was made in the opinion between the phraseology of the Tucker Act and that of the act of 1855. Indeed, *Hill vs. United States* must be deemed to have been repealed by implication by the decision in the *Dooley* case, for in the *Hill* case it is said,

"the United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. *Nor can the settled distinction in this respect between contract and tort be evaded by framing the claim as upon an implied contract.*"

It must be conceded that *Schillinger vs. United States*, 155 U. S. 163, holds directly to the contrary of our contention and that we have not the ingenuity to suggest how the court can now decide the case at bar in our favor without at least by implication overruling the *Schillinger* case. In that case Justice Brewer wrote the opinion and in the course of it he says, at page 168, after citing and discussing *Gibbons vs. United States*, 8 Wall. 269, and *Hill vs. United States (supra)*:

"While the language of the act of 1887 is broader than that of 1855, it is equally clear in withholding such jurisdiction. It added, 'all claims founded upon the Constitution of the United States,' but that does not include claims founded upon torts any more than 'all claims founded upon any law of Congress' found in the prior act. The identity of the descriptive words excludes the thought of any change."

In this opinion the Chief Justice and Justices Field, Gray, Brown, Jackson and White concurred, but Justices Harlan and Shiras dissented in an opinion written by the former, in which he says (p. 179):

"There is another view of the case which is independent of mere contract. The act of March 3, 1887, for the first time gives the Court of Claims jurisdiction to hear and determine 'all claims founded upon the Constitution of the United States' * * * and the claim to have just compensation for such an appropriation of private property to the public use is 'founded upon the Constitution of the United States. *It is none the less a claim of that character, even if the appropriation had its origin in tort.*'"

We submit that the *Schillinger* case has been "limited if not overruled" by the more recent decisions of this Court, cited above, and that consequently the proper construction of the Tucker Act is that claims "founded upon the Constitution or any law of the United States" are now within the jurisdiction of the Court of Claims whether based upon contract or tort.

SECOND POINT.

Irrespective of the authority of the recent decisions of this Court our contention is supported by the well settled rules of statutory construction.

It was manifestly the intention of Congress in enacting the Tucker Act to give the Court of Claims jurisdiction of cases "sounding in tort" but

founded upon the Constitution. Jurisdiction of claims upon contract the court already had and the words "founded upon the Constitution" are meaningless unless they apply to torts.

The Court of Claims was created by the Act of February 24, 1855, which provided

"That a court be established to be called a Court of Claims, to consist of three judges * * * and the said court shall hear and determine *all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract expressed or implied with the government of the United States* which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress" (S. L., Vol. 10, p. 612).

These provisions remained in force until they were re-enacted without change of substance by section 1059 of the Revised Statutes, which reads:

"Sec. 1059. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First: All claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress."

Section 1059 remained in force without change until the passage of the Tucker Act on March 3rd, 1887.

It is to be noted that in neither the act of 1855, nor in section 1059, is there any reference *eo nomine* to torts, but it is apparent that "cases sounding in tort" were not included unless founded upon a law of Congress.

On July 4, 1864, Congress passed an act, XIII, Stat. 381, which clearly indicates that up to that time

under the act of 1855, claims "founded upon a law Congress" included claims sounding in tort. This act was entitled

"An act to restrict the jurisdiction of the Court of Claims and to provide for the payment of certain demands," etc.

and it provided

"That the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States growing out of the destruction or appropriation of or damage to property by the army or navy or any part of the army or navy engaged in the suppression of the rebellion from the commencement to the close thereof."

Clearly some at least, if not most of the inhibited claims, would have been "founded upon a law of Congress" and would have sounded in tort.

By the act of March 3, 1887, commonly known as the Tucker Act, 24 U. S. Statutes at Large, 505, Section 1059 was repealed and the jurisdiction of the Court of Claims was enlarged and defined as follows: (We have printed the new matter added to Section 1059 in italics.)

"That the Court of Claims shall have jurisdiction to hear and determine the following matters: First, All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable."

The effect of the Tucker Act was to continue the jurisdiction first granted in 1855 over "claims founded upon any law of Congress" and "upon any regulation of an executive department" and "upon any contract, expressed or implied, with the government of the United States", and this jurisdiction is conferred with the identical words used in the Act of 1855, and in Section 1059 of the Revised Statutes, but the jurisdiction is extended to include (a) "claims founded upon the Constitution of the United States", and (b) claims "for damages liquidated or unliquidated in cases not sounding in tort", and the jurisdiction is greatly amplified by the general provision embracing all classes of claims specified, that the court shall have jurisdiction of the specified classes of claims "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable", the words "if the United States were suable" apparently being intended to refer to suits in courts of general jurisdiction at law, in equity or in admiralty. We submit that it is a manifest absurdity to say that when Congress added to the classes of claims over which the court was given jurisdiction "claims founded upon the Constitution" and claims "for damages liquidated or unliquidated in cases not sounding in tort", it intended that the words "in cases not sounding in tort" should limit and restrict the jurisdiction over claims founded upon a law of Congress or claims upon implied contracts over which the court had been granted jurisdiction more than thirty years before. It is a matter of common knowledge that it was the intention of Congress in enacting the Tucker Act not in any way to restrict the jurisdiction of the court, but greatly to increase it, and the words "for damages liquidated or unli-

uidated in cases not sounding in tort" were inserted so as to embrace claims with respect to which a doubt might arise as to whether a contract could be implied and not to restrict, limit or qualify the grant of jurisdiction over "claims founded upon the Constitution" "in respect of which claims the party would be entitled to redress against the United States—if the United States were suable".

The construction of the Tucker Act, for which we contend, gives effect to its language but does not extend the jurisdiction of the Court of Claims to embrace all torts committed by agents of the Government.

It is only for tortious acts, as a result of which claimant is deprived of some right secured him by the Constitution or laws of the United States, that he can obtain redress. There is the clearest distinction between such violations of constitutional rights and ordinary torts. A passenger in an elevator in a government building is injured through the negligence of the operator. He has no redress against the Government but his constitutional rights have not been violated. A government wagon runs over a person in the street—he has no redress. Guns are fired from government forts over claimant's property—he has no redress (*Peabody vs. United States*, 291 U. S. 530). Ordinary torts such as these are clearly omitted from the grant of jurisdiction; but where, as in the case at bar, the officers of the Government by a misconstruction of the law deprive a man of his liberty in violation of his constitutional rights, his claim is founded on the Constitution and he has the same right of redress as those whose money was taken in payment of customs duties under the same misconstruction of the law.

THIRD POINT.

**The judgment of the Court of Claims
should be reversed and the case re-
manded for hearing upon the merits.**

December, 1915.

HENRY M. WARD,
Counsel for Appellant,
17 Battery Place,
New York City.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

NARCISSO BASSO, APPELLANT,
v.
THE UNITED STATES. } No. 142.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

This is an appeal from a judgment dismissing the petition, in response to a general demurrer interposed by the Government, on the ground that the alleged claim sounded in tort.

Appellant, a citizen of Porto Rico, was arrested charged with having imported into the island of Porto Rico at the city of Humacao, on the 29th day of April, 1899, a trunk of scissors, valued at \$200, without having made entry of the same in the customhouse and without paying duty thereon. Upon the trial he was found guilty, and imprisoned at the city of San Juan, P. R., for a period of 27 days. He alleges that by reason of false imprisonment he suffered general damages in the sum of \$7,500, and special damages to the extent of \$2,500, making a total of \$10,000.

Appellant's position is that his claim is founded upon the Constitution of the United States, "in that he was deprived of his liberty without due process of law." (App. Brief, p. 1.)

The Government's position is that appellant's alleged claim is predicated upon an action sounding in tort, and that the Court of Claims has, therefore, no jurisdiction of the same.

ARGUMENT.

Under the first point in appellant's brief appears the following:

Concededly the cause of action not merely sounds in tort, but is based solely upon the tortious actions of the agents of the United States.

Appellant relies mainly upon the case of *Dooley v. The United States* (182 U. S. 222-224). In that case the action grew out of a claim for the recovery of duties "illegally exacted upon merchandise alleged not to have been imported from a foreign country." There was no question involved of tortious acts of Government officials, and the case is totally inappropriate to the situation presented here. The claim in the case at bar is not founded upon the Constitution in the sense intended in section 145 of the Judicial Code. The alleged damages follow from and are incidental to the arrest and imprisonment of appellant. If appellant was wrongfully imprisoned the tortious act of an official was involved. The law covering the jurisdiction of the Court of Claims upon the subject of torts has been settled by numerous

decisions of this court. In the case of *Schillinger v. The United States* (155 U. S. 163-168), quoted with approval in the Dooley case, *supra*, the court said:

It is said that the Constitution forbids the taking of private property for public uses without just compensation; that therefore every appropriation of private property by any official to the uses of the Government, no matter however wrongfully made, creates a claim founded upon the Constitution of the United States and within the letter of the grant in the act of 1887 of the jurisdiction to the Court of Claims. If that argument be good, it is equally good applied to every other provision of the Constitution as well as to every law of Congress. This prohibition of the taking of private property for public use without compensation is no more sacred than that other constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. Can it be that Congress intended that every wrongful arrest and detention of an individual or seizure of his property by an officer of the Government should expose it to an action for damages in the Court of Claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided.

It is true, also, that to jurisdiction over claims founded "upon any contract, expressed or implied, with the Government of the United States," is added jurisdiction over

claims "for damages, liquidated or unliquidated," but this grant is limited by the provision "in cases not sounding in tort." This limitation, even if qualifying only the clause immediately preceding, and not extending to the entire grant of jurisdiction found in the section, is a clear indorsement of the frequent ruling of this court that cases sounding in tort are not cognizable in the Court of Claims.

Counsel would attempt to escape the effect of the decision in this case by asserting that the court must assume jurisdiction of a case alleged to be founded upon a provision of the Constitution of the United States, even though the claim grew out of acts constituting a tort. In the Schillinger case, however, the court strongly indicated that wrongful arrest and detention of an individual by an officer of the Government would not subject the Government to an action for damages in the Court of Claims.

It is respectfully submitted that the judgment of the lower court should be sustained.

HUSTON THOMPSON,

Assistant Attorney General.



SUPREME COURT OF THE UNITED STATES.

No. 142.—OCTOBER TERM, 1915.

Narciso Basso, Appellant
vs.
The United States. } Appeal from the Court
of Claims.

[January 17, 1916.]

Mr. Justice MCKENNA delivered the opinion of the Court.

Appellant is a Spanish subject who resided, at the time his alleged cause of action accrued and at the time his petition was filed in the Court of Claims, in the Island of Porto Rico.

Porto Rico was ceded to the United States by the Treaty of Paris, ratifications of which were exchanged April 11, 1899. The Island was occupied by the military forces of the United States prior to January 1, 1899, and February 1, 1899, the President of the United States by order promulgated the "Amended Customs Tariff and Regulations for Ports in Porto Rico", which fixed and provided for the collection of duties upon all articles imported into Porto Rico. And duties were collected thereafter in accordance with such tariff and the amendments thereto made from time to time until May 1, 1900.

Certain officers of the army were designated to act and did act as collectors of customs under such tariff at the several ports of entry in Porto Rico and enforced such tariff upon merchandise brought into Porto Rico from the United States and from foreign countries.

Under authority of general order No. 88 the general commanding in the Island established a provisional court of the United States for the Department of Porto Rico.

On or about July 13, 1899, by information filed by the prosecuting officer of the provisional court, appellant was charged before that court with the crime of having imported from the United States into Porto Rico certain merchandise without having made entry of the same in the custom house and without having paid duty thereon. He was arraigned, pleaded not guilty, and the case was set for trial.

At the trial he entered a plea that sections 2865 and 3082 of the Revised Statutes of the United States were without force or

effect in Porto Rico, that the latter was part of the United States and that there was no warrant in law for imposing duties on goods brought from the United States into the Island.

The defenses were not allowed, he was found guilty, sentenced to imprisonment and was imprisoned for twenty-seven days.

He alleged the foregoing facts in his petition and that he suffered damages thereby in the sum of \$10,000, \$7,500 general and \$2,500 special damages. That he is advised by counsel that the act for which he was accused and condemned did not then constitute a crime; that the said sections of the Revised Statutes of the United States under which the provisional court claimed authority to act were not in force in Porto Rico and the court was wholly without jurisdiction in the premises and its sentence was null and void, and that by reason of such accusation, trial, conviction, sentence and imprisonment he was deprived of his liberty without due process of law in violation of the Constitution of the United States.

Judgment was prayed for the sum of \$10,000.

The United States filed a general traverse of the petition but subsequently moved to dismiss upon the ground that the court had no jurisdiction to consider it, it presenting "an action for damages in a case sounding in tort."

The motion was sustained and judgment entered dismissing the petition for want of jurisdiction. This appeal was then taken.

Appellant concedes that "the cause of action not merely 'sounds in tort' but is based wholly upon the tortious actions of the agents of the United States." He, however, contends that the Court of Claims has jurisdiction under the Tucker Act over claims *ex delicto* founded upon the Constitution of the United States. And this, he further contends, is supported by the recent decisions of this court, and relies especially upon *Dooley v. United States*, 182 U. S. 222.

But that case did not overrule *Schillinger v. United States*, 155 U. S. 163, which, counsel says, holds directly contrary to his contention and that he has not the ingenuity to suggest how the court can now decide the case at bar in appellant's favor without at least by implication overruling the *Schillinger* case. We are not disposed to overrule the case, either directly or by implication. The court found nothing in it antagonistic to the reasoning and conclusion reached in the *Dooley* case.

In *United States v. Lynah*, 188 U. S. 445, the *Schillinger* case was treated as subsisting authority, and Mr. Justice Brown, who

wrote the opinion in the *Dooley* case, in his concurring opinion in the *Lynah* case, considered it as correctly declaring the law.

The *Dooley* case and cases subsequent to it which are relied upon by appellant concerned the exaction of duties or taxes by the United States or its officers or property taken by the Government for public purposes.* In such cases jurisdiction in the Court of Claims for the recovery of the duties and taxes or for the value of the property taken was declared.

In the case at bar (assuming as true all that is charged) there was a wrong inflicted, if a wrong can be said to have been inflicted by the sentence of a court legally constituted after judgment upon issues openly framed by the opposing parties both of fact and the applicable law, whether that law was sections 2865 and 3082 of the Revised Statutes or the Constitution of the United States. But conceding that a wrong was inflicted through these judicial forms, the case nevertheless is of different character from the *Dooley* case, as was also the *Schillinger* case. The latter case passed upon the jurisdiction of the Court of Claims in actions founded on tort and declared the general principle to be, based on a policy imposed by necessity, that governments are not liable "for unauthorized wrongs inflicted on the citizen by their officers, though occurring while engaged in the discharge of official duties." And it was further said, "'Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on wrongful proceedings of an officer of the government.'" *Gibbons v. United States*, 8 Wall. 269, 275; *Morgan v. United States*, 14 Wall. 531, 534.

The *Schillinger* case was cited in the *New Orleans-Belize Royal Mail et al. v. United States*, ante p. —, in rejection of a contention that the United States was liable for services imposed by their officers outside of a contract with the Royal Mail Company, in the performance of which the vessel owned by the company was damaged.

We repeat, therefore, that the *Schillinger* case being subsisting authority, and appellant conceding that if such be its value it is controlling, further discussion is unnecessary.

Judgment affirmed.

Mr. Justice McREYNOLDS took no part in the consideration and decision of this case.

**United States v. Welch*, 217 U. S. 333; *United States v. Grizzard*, 219 U. S. 180; *United States v. Emery*, 237 U. S. 28.